



## Appeal of Robert M. and Mildred Scott

The issues presented are: (1) whether respondent correctly computed appellants' total income tax liability based upon respondent's treatment of Mr. Scott as a domiciliary of California during the **appeal years**, and (2) whether respondent has correctly imposed interest charges on the proposed deficiencies against appellants.

**Prior** to 1972, appellant husband (hereafter appellant) and his wife resided in Los Angeles, California. From that year until 1976, the end of the period in question, appellant was engaged in a series of travels in connection with employment and military duty. In between certain of these travels appellant returned to **Los Angeles**. In September of 1976 appellant reported to the U.S. Navy Depot at **Oakland**, California, for a short-tour military assignment which lasted until November of 1976. Throughout the period in issue appellant's wife remained at their residence in Los Angeles.

Respondent concluded that appellant was a nonresident of **California** for the period from **July 1974** through 1976 based on the fact that he was apparently outside the state for other than a temporary or **transitory** purpose. (Rev. & Tax. Code, §§ 17014, 17015.) However, respondent determined further that, during this period, appellant had retained his California (domicile). Respondent also determined that appellant's wife continued to be both a resident and a domiciliary of California during the period in question. Therefore, respondent treated the earnings of both spouses as community property, one-half taxable to each spouse, **and** further determined that since appellant was a nonresident during the period in question, appellants could not file joint returns for those years. (Rev. & Tax. Code, § 18402, subd. (b)(1).)

Based upon these conclusions, respondent determined that one-half of appellant's income, both in-state and out-of-state, was taxable to appellant's wife, and one-half of his wife's income (California derived) was taxable to him. Further, in regard to appellant's share of his own community property earnings, it was concluded that he was only **taxable** on that portion derived from California sources. Respondent then prorated the taxpayers' itemized deductions and previously assessed tax for each year to each spouse in the same proportion as that spouse's **California** adjusted gross income bears to the taxpayers' total adjusted gross income. Respondent thereafter issued a notice of proposed overpayment to appellant for taxable year 1974

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and notices of proposed assessments against him for taxable years 1975 and 1976 accordingly. Respondent also issued notices of proposed assessment against appellant's wife for taxable years 1974, 1975 and 1976. Respondent also imposed interest on the deficiency assessments.

At the protest level appellant argued that respondent's designation of him as a domiciliary of the State of California is incorrect due to the fact that appellant considered his out-of-state assignments to be permanent in nature and he never "intended" to return to the state. Also, appellant contested respondent's imposition of interest on the deficiency assessments. He did not dispute respondent's determination that appellant was a nonresident during the period at issue nor the determinations that his wife was a domiciliary and resident during the same period. After considering appellant's arguments, respondent affirmed its proposed assessments. This timely appeal followed.

We discuss first the question of domicile. Domicile may be defined as one's permanent home, to which place he has, whenever absent, the intention of returning.. (Cal. Admin. Code, tit. 18, reg. 17014-17016, subd. (c); Whittell v. Franchise Tax Board, 231 Cal.App.2d 278, 284 [41 Cal.Rptr. 6731 (1964)])

It is well settled that marital property interests in personal property are determined under the laws of the acquiring spouse's domicile. (Schechter v. Superior Court, 49 Cal.2d 3, 10 [314 P.2d 10] (1957); Rozan v. Rozan, 49 Cal.2d 322, 326 [317 P.2d 111] (1957); Appeal of the Estate of Eleanor M. Gann, Cal. St. Bd. of Equal., Dec. 13, 1971.)

Here appellant maintains that he was not a California domiciliary during his absence from California because he never "intended" to return to the state. It is correct, as previously stated, that it is the "intention of the parties" which determines domicile; however, this intention is not to be determined merely from unsubstantiated statements, but rather; the "acts and declarations of the party must be taken into consideration." (Estate of Phillips, 269 Cal.App.2d 656, 659 [75 Cal.Rptr. 301] (1969) (Emphasis Added).)

The record in this case is devoid of any acts by appellant which would tend to establish perennial connections in any of his out-of-state locations. To

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the contrary, appellant continued to own a home in California in which his wife resided, and from time to time he returned to that home. As we stated in the Appeal of Annette Bailey, decided by this board March 8, 1976, the maintenance of a marital abode is a **significant factor** in resolving the question of domicile. It is clear here, as in Bailey, supra, that appellant considered the parties' California abode as the marital abode. The circumstances convince us that appellant considered California his home, and that he did not intend to remain in any of the out-of-state locations either permanently or indefinitely. We therefore conclude that he remained domiciled in California throughout his absence. (See Chapman v. Superior Court, 162 Cal.App.2d 421 [328 P.2d 23] (1958).)

In view of the finding that appellant never ceased to be a California domiciliary, the character of Mr. Scott's earnings while away from California is controlled by California law. Therefore, appellant's salary was community property and owned equally by appellant and his wife, and Mrs. Scott's half was **includible** in her income for purposes of determining her California income tax liability for the years in question. (United States v. Malcolm, 282 U.S. 792 [75 L.Ed. 714] (1931); United States v. Mitchell, 403 U.S. 190 [29 L.Ed.2d 406] (1971); Appeal of Idella I. Browne, Cal. St. Bd. of Equal., March 18, 1975.) We find respondent's allocations, prorations and consequent assessments to be consistent with our determinations.

We turn now to the issue relating to the imposition of interest by respondent upon appellants' respective deficiency judgments. This board has consistently held that the imposition of interest upon a deficiency is mandatory under section 18688. (Appeal of Amy M. Yamachi, Cal. St. Bd. of Equal., June 28, 1977.) Furthermore, interest is not a penalty; rather it is compensation for the use of money. (See Appeal of C. Irey Jaegle, Cal. St. Bd. of Equal., June 22, 1976; and Appeal of Allan W. Shapiro, Cal. St. Bd. of Equal., Aug. 1, 1974.) Consequently, respondent acted correctly in imposing interest on the deficiencies.

For the reasons stated, we must sustain respondent's action.

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## ORDER

Pursuant to the views expressed in the opinion  
Of the board on file in this proceeding, and good cause  
appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Robert M. Scott against proposed assessments of additional personal income tax in the amounts of **\$245.40** and \$87.95 for the years 1975 and 1976, respectively, and on the protest of Mildred Scott against proposed assessments of additional personal income tax in the amounts of \$18.78, **\$1,300.97** and \$665.72 for the years 1974, 1975 and 1976, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 2nd day of March, 1981, by the State Board of Equalization, with **Members Dronenburg, Reilly and Nevins** present.

Ernest J. Dronenburg, Jr., Chairman

George R. Reilly, Member

Richard Nevins, Member

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